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National Cable Television Association

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January 25, 1995

Delivered By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Cable Home Wiring, MM Dkt. 92-260

Dear Mr. Caton:

On January 25, 1995, Daniel L. Brenner sent the attached letter to William E. Kennard, General Counsel. Copies of this letter were delivered to Blair Levin, Merrill Spiegel, Jill Luckett, Mary McManus, Maureen O'Connell, Lisa Smith, Jill Ross-Meltzer, and Greg Vogt.

An original and one copy are enclosed for inclusion in the above-referenced docket record.

Sincerely,

Daniel L. Brenner

DLB:tkb

Enclosures

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January 25, 1995

Hand Delivered

Mr. William E. Kennard, Esquire
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Re: MM Docket No. 92-260 (Cable Home Wiring)

Dear Mr. Kennard:

As you may be aware, the FCC invited certain parties interested in the above-referenced proceeding to participate in a panel discussion on January 18, 1995 to address various issues raised in petitions for reconsideration of the Commission's Report and Order in MM Docket 92-260[1] (Cable Home Wiring) as well as in a related rulemaking petition, RM-8380. Gregory J. Vogt, Deputy Chief of the Cable Services Bureau, who acted as facilitator for this discussion, urged the participants to focus on certain factual issues of interest to the FCC staff, and to avoid discussion of legal issues.

NCTA made every effort to offer meaningful participation within the confines established by Mr. Vogt for the January 18 presentation. We are concerned, however, that by focusing on certain highly technical factual details involved in this proceeding, the Commission may lose sight of the overriding legal issues which, in our view, clearly dictate the only legally sustainable action the Commission may take regarding these matters, i.e., reaffirmation of the rules adopted in the Cable Home Wiring Report and Order and dismissal of the reconsideration petitions as well as the rulemaking petition (RM-8380).

The proper legal analysis to guide the Commission's actions in these matters is set forth at length in various formal pleadings and informal ex parte submissions filed by NCTA and certain of its members in these proceedings. However, given that formal Commission

1 8 F.C.C. Rcd 1435 (1993) (hereinafter "Cable Home Wiring Report and Order").

consideration of these matters may be imminent, we are taking the liberty of providing you with a summary of such legal analysis.

1. The Commission Lacks Jurisdiction To Move The Point Of Demarcation In Multiple Dwelling Unit ("MDU") Buildings As Advocated In Petitions For Reconsideration.

In its Cable Home Wiring Report and Order, the Commission established the point of demarcation for cable home wiring in MDU buildings "at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit."[2] Various petitions for reconsideration filed by telephone interests and others seek to move the point of demarcation in MDUs to a spot potentially hundreds of feet outside the individual unit, where the "riser" cable splits off to the "home run" cable used to transmit signals to each individual unit.

Sound policy reasons justify rejection of this position. If a cable operator is forced to cede a substantial portion of its distribution infrastructure in MDU buildings for the benefit of a competitor, that operator will be foreclosed from continuing to offer video, data or voice services, including telephony, to the resident of that unit. In other words, the subscriber would be boxed into an either/or, one-wire world where all broadband communications services must be delivered by a single provider, rather that the multiple-provider model of facilities-based competition as envisioned by Vice President Gore, Chairman Hundt, and various Congressional leaders. It is thus easy to understand why the telephone industry particularly is advocating this radical change to the Commission's current rules -- it would effectively insulate them from competition in MDU buildings.

But legal condiderations precluding adoption of the telephone industry position are equally as compelling as the policy grounds. On its face, the home wiring provision of the 1992 Cable Act applies exclusively to wiring "installed by the cable operator within the premises of such subscriber."[3] Similarly, the House Report, which accompanied the home wiring statutory language adopted by the conference Agreement, makes clear that Congress intended that the home wiring provision applies "only to internal wiring contained within the home and does not apply to . . . any wiring, equipment or property located outside of the home or dwelling unit."[4]

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2 47 C.F.R. § 76.5(mm)(2).

3 47 U.S.C. § 544(i) (emphasis added). A copy of the relevant statutory language and legislative history is attached.

4 H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") (emphasis added).

The use of the term dwelling unit is significant in that it evidences Congress' express understanding of the applicability of this provision in the MDU context. Indeed, in the mere four paragraphs in the House Report on home wiring, the Committee repeated this point several times:

> This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section [covers] . . . only the wiring <u>within the dwelling unit of individual subscribers</u>.[5]
>
> * * *
>
> The Committee is concerned especially about the potential for theft of services within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed <u>within the interior premises</u> <u>of a subscriber's dwelling unit</u>.[6]

The statutory language and legislative history of the home wiring provision of the 1992 Cable Act are unusually clear and unambiguous. The Commission simply lacks jurisdiction to move the point of demarcation in MDU buildings to a point far outside the interior premises of the individual subscriber's dwelling unit, as advocated by the petitions for reconsideration.[7]

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5 <u>Id</u>. at 119 (emphasis added).

6 <u>Id</u>. at 118 (emphasis added).

7 Adoption of any of the proposals to radically alter the Commission's existing home wiring rules would also raise insurmountable taking issues under the fifth and fourteenth amendments to the U.S. Constitution. NCTA declines to address such issues here lest such discussion might be misconstrued as a concession that cable operators would agree to convey critical portions of their distribution infrastructure if only they were provided with "just compensation." To the contrary, cable operators have invested in distribution facilities so they can <u>compete</u>, not so they can be forced to sell out to competitors. In other contexts, the Commission has forcefully argued that cable operators should not be allowed to voluntarily sell out to the local telephone company. <u>See</u> <u>Video Dialtone Report and Order</u>, 7 F.C.C. Rcd 5781, 5835-36 (1992). It would be ironic and unfair for the Commission in this proceeding to adopt rules which, in effect, would allow a telephone company or other competitor to force a cable operator to sell out against its will.

2. Changing The Point Of Demarcation Would Increase Costs To Consumers

It is be beyond dispute that a primary goal of the 1992 Cable Act was to hold down the cost of cable service to consumers. In particular, regarding the specific issue of home wiring, the Senate Report "urge[d] the FCC to adopt policies that will protect consumers against unnecessary charges, for example, for home wiring maintenance."[8]

With the current point of demarcation in MDU buildings, the distribution infrastructure installed in such buildings is deemed "outside plant." Thus, cable operators are responsible for the costs of maintenance and repair of such facilities. These costs may not be passed through to consumers in the form of higher cable rates by the vast majority of cable operators who have elected the Commission's benchmark rate methodology.

However, if the point of demarcation is moved far outside each individual dwelling unit, for example, to the "lockbox" or the "minimum point of entry," the costs of maintenance and repair of the internal broadband distribution infrastructure in MDU buildings would be shifted to the landlord or the unit owner. Such distribution infrastructure often contains amplifiers or other sensitive electronic components which require expert maintenance. In the on-going proceeding involving the re-examination of the telephone point of demarcation in MDUs, building owners have argued that the current FCC rules unfairly shift the costs of maintenance of telephone plant to them because the point of demarcation is far outside each individual dwelling unit.

Given the express legislative history of the 1992 Cable Act, the Commission should retain the current point of demarcation in MDU buildings so as to avoid shifting the costs of maintaining MDU distribution infrastructure to consumers.

3. The Commission Lacks Jurisdiction To Require Cable Operators To Relinquish Ownership Of Home Wiring Prior To Termination Of Service By the Subscriber

RM-8380 urges the Commission to adopt regulations allowing subscribers to acquire home wiring installed by the cable operator immediately upon installation, rather than upon termination of service. The statutory language and legislative history could not be clearer to the contrary. The plain statutory language directs the Commission to:

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8 S. Rep. No. 92, 102d Cong., 1st Sess. 23 (1991).

> prescribe rules concerning the disposition after a subscriber to a cable system terminates service, of any cable installed by the cable operator . . .[9]

Similarly, the legislative history is equally clear:

> The Committee believes that subscribers who terminate service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit.
>
> * * *
>
> This section does not address matters concerning the cable facilities inside the subscriber's home prior to termination of service.[10]

The Congressional mandate to the Commission, as set forth in the home wiring provision of the 1992 Cable Act, is sharply defined and carefully limited in scope. The Commission should assiduously avoid excursions far beyond these express parameters, particularly given the broad reexamination of telecommunications policy currently underway in Congress.

4. The Commission Lacks Jurisdiction To Require Cable Operators To "Share" Their Distribution Facilities With Competitors

Certain parties filing comments in RM-8380 have urged that the Commission adopt rules requiring cable operators to "share" home wiring, so as to allow competitors to deliver services over that wiring even while the cable operator continues to deliver signals over that same wiring. At the Commission's informal meeting on January 18, no participant seriously contended that such "sharing" was technically practicable at the present time, that the technology to accomplish such "sharing" is likely to be developed in the foreseeable future, or that if such technology is ever developed, that it would not in all cases be less expensive and more reliable to simply install an additional wire than to try to "share" the existing wire.

Even if these insurmountable technical problems did not exist, the Commission is nevertheless legally precluded from mandating such sharing. Stripped to its essence, sharing is nothing more than a euphemism for a requirement that a cable operator open its facilities to be used by others, against the cable operator's will. In other words, "sharing" is shorthand for the imposition of common carrier obligations on cable operators.

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9 47 U.S.C. § 544(i) (emphasis added).

10 House Report at 118 (emphasis added).

In the 1984 Cable Act, Congress was explicit in its directive that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."[11] In obvious recognition of the potential for improperly-crafted home wiring rules to impose such common carrier requirements on cable operators, the legislative history of the home wiring section of the 1992 Cable Act expressly admonishes that "the Committee does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes."[12]

For the reasons stated above, we urge you to advise the Commission that the petitioners' proposals in MM Docket No. 92-260 and RM-8380 are unlawful.

Respectfully,

Daniel L. Brenner

DLB: MS
Attachments

cc: Secretary William F. Caton, Acting
Blair Levin
Jill Luckett
Mary McManus
Maureen O'Connell
Jill Ross-Meltzer, Esquire
Lisa Smith
Merrill Spiegel
Greg Vogt, Esquire

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11 47 U.S.C. § 541(c)

12 House Report at 118-19; see also Midwest Video Corp. v. FCC, F.2d 1025, 1051 (1978) ("We find it an unwarranted intrusion into the conduct of a cable enterprise for the Commission to mandate that cable companies offer services as common carriers . . ."), aff'd, 440 U.S. 689, 708-09 (1979) ("The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters.").